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No. 06-1164

IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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ARGUMENT

The Government's brief in opposition demonstrates why the important, unsettled and recurring questions presented in the petition warrant this Court's review. The Government attempts to minimize the change in the "jurisdiction" landscape caused by this Court's recent cases that undercut the force of the Court's 19th century statutes of limitation cases. The Government overlooks the importance of the Federal Circuit's intra-circuit conflict, and concedes that the decision below conflicts in principle with decisions from other circuits. The Government ignores the continuing disarray in the Court of Federal Claims over the jurisdictional issue. On the accrual of John R. Sand's permanent physical taking claim, the Government attempts to brush aside the distortion of accrual rules caused by the decision below. Finally, the Government's opposition reframes the question presented to minimize its tactical decision to agree with John R. Sand on the date of accrual of John R. Sand's taking claim.

1. The Government's brief in opposition rephrases the question presented to deflect the important and unsettled nature of the issue decided below. The Government seeks to transform the important jurisdictional issue addressed by the panel majority and dissent into a question of minor error. Opp. I.

The issue presented as framed by the Government – whether a court of appeals may *sua sponte* raise a statute of limitations issue – begs the question presented by John R. Sand. Only if 28 U.S.C. §2501 is jurisdictional would the Federal Circuit be justified in addressing the timeliness of John R. Sand's

complaint where the Government agreed that John R. Sand's complaint was filed timely. Indeed, John R. Sand concedes that a court must always question its subject matter jurisdiction. Pet. 8 n. 2, citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). The Government's unexceptional question, however, is not an issue that sharply divided the panel majority and dissent. That issue is whether the statute of limitations in 28 U.S.C. §2501 limits the jurisdiction of the Court of Federal Claims.

2. In its Statement, the Government implies that John R. Sand wrongfully interfered with the remedial work at the landfill. Opp. 3. The Government overlooks, however, that the government contractor determined in 1992 to do away with John R. Sand's property rights, before any EPA fences were erected at the landfill site:

> The continued existence or operation of these facilities [including John R. Sand] in their present locations is inconsistent with the effective management of this Site.
>
> The lease with the John R. Sand and Gravel Company (if still in existence) should be terminated to ensure that this operation does not interfere with future activities associated with the RD/RA [remedial design/remedial action].

Jt. Ex. 8, C.A. App. 3191. In addition, in relation to John R. Sand's mining operations relative to the landfill (Opp. 2-3), John R. Sand was never named a potentially responsible party concerning the landfill under the Comprehensive Environmental Response,

Compensation and Liability Act, 42 U.S.C. §9601 *et seq.*, or any other relevant environmental laws. C.A. App. 1731.

3. The Government's opposition overlooks dicta from this Court's 19th century decisions that form the basis of the Federal Circuit's limitations-as-jurisdictional holdings. The Government's opposition also fails to recognize the placement of §2501 in the procedural chapter of the Judicial Code concerning the Court of Federal Claims.

a. The Government argues that the Court has consistently treated §2501 as jurisdictional, citing *Kendall v. United States*, 107 U.S. 123 (1883), and *Finn v. United States*, 123 U.S. 227 (1887) (Opp. 8-10), as did the panel majority of the Federal Circuit. Pet. App. 18a-19a. The jurisdictional edifice constructed by the Federal Circuit is built upon *Kendall*, *Finn* and *Soriano v. United States*, 352 U.S. 270 (1957). See Pet. 11-13. But this edifice is grounded on dicta in those cases.

Kendall held that the Court could not engraft a disability, not mentioned in the predecessor to §2501, onto the statute to extend the six-year limitations period. 107 U.S. at 125. *Kendall* did not decide, however, whether the statute's six-year limitation was a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims.

Finn acknowledged that the plaintiff's claim for the value of horses and mules he provided the Government during the Civil War to be "cognizable" by the Court of Claims, 123 U.S. at 231-232, but held that the claim could not be revived by the executive branch on a second application by the plaintiff twelve years after the executive branch first denied the claim. *Id.* at 233. From that second attempt comes the oft-quoted

phrase: "[B]ut the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id.* That statement dealt with a statutory procedure by which the executive referred claims to the Court of Claims, see now 28 U.S.C. §2510 (referrals by Comptroller General to Court of Federal Claims), rather than whether the predecessor to §2501 is a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims.

Soriano, like *Kendall*, involved whether a disability not included in the statute can toll the statute of limitations in §2501. 352 U.S. at 275. Citing *Kendall*, the Court held that the six-year limitation on plaintiff's claim for compensation for supplies requisitioned by Philippine guerrilla forces during the second world war could not be tolled because war was not a disability mentioned in the statute and could not be implied. *Id.* at 276. Whether *Soriano's* strict non-tolling rule remains good law is doubtful in light of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990) (see Pet. 12-13, 34a-36a (dissent below)). Nevertheless, *Soriano* did not decide whether §2501 constitutes a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims.

b. The Government argues that the Court should not hold the petition in this case pending its decision in *Bowles v. Russell*, No. 06-5306 (argued March 26, 2007), because *Bowles* involves the different question of whether 28 U.S.C. §2107 establishes a jurisdictional time limit for filing a notice of appeal in a federal civil case. Opp. 15-16. Although *Bowles* deals with appellate jurisdiction of the courts of appeal rather

than subject matter jurisdiction of the Court of Federal Claims, one issue in *Bowles* is relevant here.

A substantial issue at oral argument in *Bowles* was the relevance of the location of 28 U.S.C. §2107 in relation to the appellate jurisdiction of the courts of appeal. Tr. oral arg. at 29-31. In this case, the panel majority overlooked the structure of Title 28 relating to the jurisdiction and procedure of the Court of Federal Claims. Section 2501 does not appear in Chapter 91 of Part IV of Title 28, entitled "Jurisdiction and Venue". Rather, §2501 appears in Chapter 165, entitled "United States Court of Federal Claims Procedure".

The Government argues that Congress has reenacted §2501 without substantial change and therefore a presumption arises that Congress is aware of prior judicial interpretations, citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Opp. 9-10. That argument, however, overlooks the recodification and rearrangement of Title 28 in 1948, 62 Stat. 869, 940-942, 975-976, that clearly separated Court of Federal Claims procedure from Court of Federal Claims jurisdiction. The present structure of Title 28 was not considered by *Kendall*, *Finn* or their progeny, but should be addressed by the Court to "brush away confusion introduced by our earlier opinions", *Eberhart v. United States*, 546 U.S. 12, 16 (2005), about the jurisdictional nature *vel non* of §2501.

4. The Government ignores the common thread of the Court's recent claim-processing cases that, absent a clear statement of congressional intent, statutes of limitation are not jurisdictional. *Arbaugh v. Y & H Corp*, 546 U.S. 500, 515-516 (2006). See Opp. 12. The question here is whether §2501 is such a clear statement of congressional intent. No modern decision of the Court has so held, and the efficacy of the dicta in

the Court's 19th century cases is doubtful upon close reading in light of *Irwin*. More generally, the issue concerns the long-standing rule that statutes of limitation must be strictly construed in favor of the Government because they condition the waiver of sovereign immunity. See *Block v. North Dakota*, 461 U.S. 273, 287 (1983). That rule has allowed lower courts to construe §2501 to be a limit on subject matter jurisdiction, even though the statutory text assumes that subject matter jurisdiction exists.

a. The question presented in this case concerning whether §2501 limits the subject matter jurisdiction of the Court of Federal Claims should rank in importance similar to the questions presented in this Court's recent claim-processing cases: *Kontrick v. Ryan*, 540 U.S. 443 (2004) (bankruptcy rules); *Scarborough v. Principi*, 541 U.S. 401 (2004) (Equal Access to Justice Act fee-processing procedure); *Eberhart*, *supra* (Fed. Rule Crim. Proc. 33(a) concerning motions for new trial); *Arbaugh*, *supra* (definition of "employer" in Civil Rights Act of 1964); *Day v. McDonough*, 547 U.S. 198 (2006) (habeas petition under Antiterrorism and Effective Death Penalty Act of 1996); and *Bowles*, *supra* (motion to reopen appeal time under Fed. Rule App. Proc. 4(a)(6)). The Government's attempt to distinguish these cases (Opp. 12) ignores this Court's efforts to clarify the concept of jurisdiction. The unsettled relationship between the Tucker Act's statute of limitations and subject matter jurisdiction warrants similar clarity from this Court.

b. The Government asserts that the intra-circuit conflict concerning the jurisdictional nature of §2501 that has divided the Federal Circuit for 20 years provides no basis for this Court's review, citing *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Opp. 13 n.3. See Pet. 15-17. *Wisniewski* is readily distinguishable, because it involved certification by a court of appeals to this Court of a question that should not have invoked the "exceptional" jurisdiction of this Court on certification, see S. Ct. Rule 19, a procedure not involved here.

The Government overlooks the importance of intra-circuit conflict in the Federal Circuit in relation to this Court's review. The Federal Circuit has "exclusive jurisdiction" of appeals from final decisions of the Court of Federal Claims. 28 U.S.C. §1295(a)(3). As to matters that fall within the Federal Circuit's exclusive appellate jurisdiction, no conflict with decisions of the regional courts of appeal can arise. Thus, in the absence of review by this Court, decisions by the Federal Circuit declare the law. For issues solely within the exclusive jurisdiction of the Federal Circuit, there is no opportunity for this Court to await percolation of issues through the regional courts of appeal. In addition, this Court has granted certiorari regarding important questions of Court of Federal Claims' jurisdiction decided by the Federal Circuit in the absence of inter-circuit conflict. *Keene Corp. v. United States*, 508 U.S. 200 (1993) (28 U.S.C. §1500 precludes Court of Federal Claims jurisdiction over claims pending in another court).

Indeed, two aspects of the Federal Circuit's intra-circuit conflict are functional equivalents of inter-circuit conflict. First, the Federal Circuit has wrestled with the jurisdictional nature of §2501 for twenty years. See Pet. 15-17. Second, the panel majority and dissent take squarely conflicting positions on the jurisdictional issue, each citing cases on the two sides of the Federal Circuit's twenty-year debate. A square and

irreconcilable conflict could not be more clear and more clearly in need of prompt review by this Court.

c. The Government conceded that the Federal Circuit's decision conflicts in principle with decisions from other circuits that hold that statutes of limitation for bringing suit against the United States generally are not jurisdictional in the absence of a clear congressional statement. Opp. 13-14. Thus, the Government implicitly acknowledges that the issue of whether §2501 represents a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims is ripe for review by this Court.

5. The Government attempts to minimize the importance of the second question presented, whether a claim for a permanent physical taking of a portion of real property first accrues upon the Government's temporary exclusion of the property holder from another portion of the property. The Government characterizes the question as raising no issue of broad legal importance. Opp. 16-17. The Government asserts that any disagreement over the Federal Circuit's holding is simply a question of whether the Federal Circuit erred in applying "established legal principles". However, the Federal Circuit significantly altered the test of permanent physical occupancy set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991), to allow a permanent physical occupation to occur when the government has a "presence of a permanent nature" anywhere on the property holder's property. Pet. App. 26a. This change is hardly an application of established legal principles.

The Government fails to appreciate the "serious imprecision" (Pet. 39a) that the Federal Circuit's decision now imposes on takings law. This imprecision leaves in doubt the calculation of an accrual date of physical takings cases where such takings are "typically obvious and undisputed." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 n. 17 (2002). This imprecision will allow the government to manipulate the accrual date based upon its "presence" rather than its "permanent occupancy." This imprecision will reverberate through takings cases absent review by this Court.

CONCLUSION

The petition for certiorari should be granted.

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